PP

v.

KON CHIANG FATT

HIGH COURT SABAH & SARAWAK, KUCHING
RICHARD MALANJUM J
[CRIMINAL APPEAL NO: 42-04-2002]
20 OCTOBER 2002

CRIMINAL LAW: *Emergency (Essential Powers) Ordinance No: 22 of 1970 - Section 2 - Corrupt practice - Government servant - Issuing local purchase orders to firm belonging to daughter - Whether mens rea established*

The respondent was charged with five counts of corrupt practice under s. 2(1) of the Emergency (Essential Powers) Ordinance No: 22 of 1970 ('the Ordinance'). In the court below, evidence was led that the respondent, as the Acting Principle Assistant Director in the Human Resource Management Division of the Chief Minister's Office, Kuching Sarawak, had issued local purchase orders ('LPOs') for certain items to a firm owned and controlled by his daughter. The evidence notwithstanding, the learned Sessions Court judge, having heard the defence, took the view that the prosecution had not proved *mens rea* or culpable intent on the part of the accused, and further that the accused, on the facts and in the circumstances, had not abused his position as a public servant to his pecuniary advantage as required by s. 2(1) of the Ordinance. The accused was hence acquitted and discharged whereupon the prosecution appealed.

Held (dismissing the appeal):

[1] The trial court was in doubt on the factual evidence adduced by the prosecution relating to the *mens rea* for the offences and there was no reason for this court to interfere. Further, the evidence of the witnesses called indicated that the signing of the LPOs was a matter of course with no element of decision making process. This would defeat any assertion of *mens rea* arising from the signing of the said documents. (pp 579 e & 580 e)

Case(s) referred to:
Lim Kheak Teong v. PP [1984] 2 CLJ 219; [1984] 1 CLJ (Rep) 207 ***(refd)***
Mat v. PP [1963] MLJ 263 ***(cit)***
Wong Voon v. PP [1984] Kota Kinabalu Criminal Appeal No. 24 of 1984 ***(dist)***

Legislation referred to:
Emergency (Essential Powers) Ordinance No. 22 of 1970, s. 2(1)
Public Officers (Conduct and Discipline) Regulations 1971 (State of Sabah), reg. 3
Sarawak State General Order, O. 153(4)(a)

For the appellant - Saiful Idris Zainuddin; DPP
For the respondent - Anthony Tai; M/s Anthony Tai Advocates

Reported by Mariette Peters-Goh

JUDGMENT

Richard Malanjum J:
On 8 July 2002 I dismissed the appeal by the prosecution (the appellant in this case) against the decision of the learned Sessions Court Judge in Kuching acquitting the respondent on five charges punishable under s. 2(1) of the Emergency (Essential Powers) Ordinance No. 22 of 1970 (the Ordinance). I indicated that I would give my reasons in the event of further appeal. As there is now a Notice of Appeal lodged by the appellant this is therefore my reasons.

The charges against the respondent were as follows:

First Charge:

That you, on the 8th August 1997 at the office of Bahagian Pengurusan Sumber Manusia, Jabatan Ketua Menteri Sarawak, Kuching, in the District of Kuching, in the State of Sarawak, being a public officer, namely Pemangku Ketua Penolong Pengarah, Bahagian Pengurusan Sumber Manusia, Jabatan Ketua Menteri Sarawak, whilst being such officer committed corrupt practice by using your public office for your advantage, in that you have issued Local Purchase Order A No. 750303, to a firm wholly owned by your daughter, Kon Siew Ping, namely Kua Agency, for the supply of computer accessories, namely, 2 boxes of HP Laser Jet Toner Cartridge C3900A and 2 boxes of HP Laser Jet Toner Cartridge 92298A costing RM1,900.00 to Bahagian Pengurusan Sumber Manusia, Jabatan Ketua Menteri Sarawak, and that you have thereby committed an offence punishable under Section 2(1) of the Emergency (Essential Powers) Ordinance No. 22 of 1970.

Second Charge:

That you, on the 21st November 1997 at the office of Bahagian Pengurusan Sumber Manusia, Jabatan Ketua Menteri Sarawak, Kuching, in the District of Kuching, in the State of Sarawak, being a public officer, namely Pemangku Ketua Penolong Pengarah, Bahagian Pengurusan Sumber Manusia, Jabatan Ketua Menteri Sarawak, whilst being such officer committed corrupt practice by using your public office for your advantage, in that you have issued Local

Purchase Order A No. 847725, to a firm wholly owned by your daughter, Kon Siew Ping, namely Kua Agency, for the supply of computer accessories, namely, 3 units HP Laser Jet Toner 4/4M-92298A, 3 units of HP Series II/III Toner-92295A, 20 units of 3M DDS-90 and 10 units of Sony DG 90M costing RM3,840.00 to Bahagian Pengurusan Sumber Manusia, Jabatan Ketua Menteri Sarawak, and that you have thereby committed an offence punishable under Section 2(1) of the Emergency (Essential Powers) Ordinance No.22 of 1970.

Third Charge:

That you, on the 19th December 1997 at the office of Bahagian Pengurusan Sumber Manusia, Jabatan Ketua Menteri Sarawak, Kuching, in the District of Kuching, in the State of Sarawak, being a public officer, namely Pemangku Ketua Penolong Pengarah, Bahagian Pengurusan Sumber Manusia, Jabatan Ketua Menteri Sarawak, whilst being such officer committed corrupt practice by using your public office for your advantage, in that you have issued Local Purchase Order A No. 847775, to a firm wholly owned by your daughter, Kon Siew Ping, namely Kua Agency, for the supply of computer accessories, namely, 4 units of HP 3900A Toner, 20 boxes of 3M DDS-90, 20 boxes of Sony DG 90M, 25 boxes of Kodak CDR and 4 boxes of Verbatim CD-RW costing RM8,250.00 to Bahagian Pengurusan Sumber Manusia, Jabatan Ketua Menteri Sarawak, and that you have thereby committed an offence punishable under Section 2(1) of the Emergency (Essential Powers) Ordinance No. 22 of 1970.

Fourth Charge:

That you, on the 26th December 1997 at the office of Bahagian Pengurusan Sumber Manusia, Jabatan Ketua Menteri Sarawak, Kuching, in the District of Kuching, in the State of Sarawak, being a public Officer, namely Pemangku Ketua Penolong Pengarah, Bahagian Pengurusan Sumber Manusia, Jabatan Ketua Menteri Sarawak, whilst being such officer committed corrupt practice by using your public office for your advantage, in that you have issued Local Purchase Order A No. 847819, to a firm wholly owned by your daughter, Kon Siew Ping, namely Kua Agency, for the supply of computer accessories, namely, 11 boxes of HP 92298A Toner and 11 boxes of HP 92295A Toner costing RM9,900.00 to Bahagian Pengurusan Sumber Manusia, Jabatan Ketua Menteri Sarawak, and that you have thereby committed an offence punishable under Section 2(1) of the Emergency (Essential Powers) Ordinance No. 22 of 1970.

Fifth Charge:

That you, on the 30th December 1997 at the office of Bahagian Pengurusan Sumber Manusia, jabatan Ketua Menteri Sarawak, Kuching, in the District of Kuching, in the State of Sarawak, being a public officer, namely Pemangku Ketua Penolong Pengarah, Bahagian Pengurusan Sumber Manusia, Jabatan Ketua

Menteri Sarawak, whilst being such officer committed corrupt practice by using your public office for your advantage, in that you have issued Local Purchase Order A No. 847821, to a firm wholly owned by your daughter, Kon Siew Ping, namely Kua Agency, for the supply of computer accessories, namely, 8 boxes of HP 3900A Toner costing RM5,280.00 to Bahagian Pengurusan Sumber Manusia, Jabatan Ketua Menteri Sarawak, and that you have thereby committed an offence punishable under Section 2(1) of the Emergency (Essential Powers) Ordinance No. 22 of 1970.

There was no dispute on the following facts, namely, that the respondent was a public officer and at the material time he was the Acting Principal Assistant Director in the Human Resources Management Division of the Chief Minister's Office, Kuching Sarawak. And it was also not in issue that the items mentioned in the charges were supplied to the Human Resources Management Division with the signatures of the respondent on the Local Purchase Orders for those items. Further that Kua Agency was owned by one Kon Siew Ping the daughter of the respondent was also not in dispute.

At the end of the prosecution case the learned Sessions Court judge called for the defence of the respondent on those charges. And having heard the version of the respondent he was discharged and acquitted. The gist of the prosecution case was that in issuing the respective Local Purchase Orders (LPO) for those items mentioned in the charges the respondent was in conflict of interest situation in that he had abused his position and thus committed distinct offences under the said Ordinance. The unreported case of *Wong Voon @ David Wang Chang Vun v. Public Prosecutor* [1984] Kota Kinabalu Criminal Appeal No. 24 of 1984 was one of the decided cases relied upon by the prosecuting officer to call for the conviction of the respondent. And in *Wong Voon*'s case *(supra)* the accused was the director of the Welfare Department Sabah. There was a serious flood in the northern part of the State in December 1980. The State Welfare Ministry was therefore asked to bring immediate relief to the affected victims of the flood. To achieve the purpose quickly the State Finance Ministry gave authority to the Welfare Ministry to buy food supplies directly without going through the tender procedure so long as the prices were within the specified prices including sardines at RM1.50 per tin. In turn the Welfare Ministry directed the various District Offices affected by the flood and the Welfare Department which was under the directorship of the accused to take all necessary arrangements for the supply of food to the victims of the flood. On 3 January 1981 the accused wrote a letter to the Permanent Secretary of the Welfare Ministry informing the latter of the names of the suppliers willing to do the supplies. One of them was Momboh Enterprise in which the wife of the accused had interest therein. There was a reply from the Ministry which was taken by the accused as authorizing him to purchase from Momboh. As

a result the accused proceeded to issue and sign four purchase orders to Momboh. Incidentally that firm was involved in the supply of spare parts as one of its businesses. One week after the issuing of the purchase orders four payment bills date 16 January 1981 came from Momboh. And in response the accused signed payment vouchers for those bills. The same were presented to the State Treasury for payments and which was duly done. Subsequently the sums received found their ways into the bank accounts of that firm with the Hong Kong and Shangai Bank Kota Kinabalu which was earlier on opened by the accused and one other as the introducer. From there the sums went into various payments for the benefit of the accused and some others connected to him. The Sessions Court convicted the accused. On appeal to the High Court the main point raised was whether the accused abused his position when he signed and issued the purchase orders and the payment vouchers for the said firm.

There was no dispute on the *actus reus* aspect of the deeds. And it was also accepted as a principle of law that *mens rea* for such an offence would be established by way of proof of breach of any statutory provision applicable. The learned judge found that the relevant statutory provision applicable was reg. 3 of the Public Officers (Conduct and Discipline) Regulations 1971 (State of Sabah). And it was also found by the learned Judge that there was an infringement of the said regulation despite the letter to the Permanent Secretary of the Welfare Ministry. To avoid any semblance of conflict of interest it was propounded by the learned judge that the accused should have done two things, namely, to declare his interest and to disqualify himself. It was his view that the decisions or the acts performed by the accused concerning the firm should have been done either by the Ministry or some other senior officials in the Ministry but not the accused. Thus the learned judge found that the signing by the accused of the local purchase orders constituted an infringement of the regulation and hence had abused his position.

Reverting to the present case it was the submission of learned counsel for the respondent that *Wong Voon* case *(supra)* could be distinguished in that an infringement of procedure was found when the accused issued the local purchase orders. There was no similar allegation in the instant case. It was also contended that the learned Sessions Court judge had taken all the evidence into consideration before coming to her decision to acquit the respondent.

Now in acquitting the respondent the learned Sessions Court judge, *inter alia*, said:

> At the *prima facie* stage, I did rule that a contravention of Order 153(4)(a) of the State General Order provided the necessary mens rea for the offences

facing the accused. I will now examine his defence to see if he had through the evidence of himself and his witnesses create any reasonable doubt that he had the guilty mind when signing all 5 LPOs, in other words whether the 2nd ingredient of the offence as outlined in my written ruling had been proved beyond reasonable doubt.

...

As was made clear by me in my written ruling, in respect of the first charge in Summons No. SC-61-5-2001-III, no evidence was led as to the circumstances leading to the purchase of the goods stated in the relevant LPO, Ex. P7. The rest of the 4 LPOs in the 4 remaining charges, the circumstances were, if I may again repeat (in brief) from what I have said at page 46 of the notes of proceedings, ie, PW5 said that the accused supplied her with a list of suppliers including Kua Agency's and that she on her part listed out the quotation from these suppliers on the said list and the accused the chose Kua Agency over and above the other suppliers. The said lists of suppliers were missing and not evidence before me. In this regard I do not think it can be disputed, as the evidence from both the prosecution and the defence amply bore the fact, that the prices charged by Kua Agency for the goods supplied were fair and reasonable. It was also a fact proven, even by the prosecution witnesses that Kua Agency was a reliable supplier who was prompt in its delivery. What varies was, firstly, the evidence if PW4 who said that all purchases except that from the account section, must be made with the accused's permission even though he agreed in cross-examination that the accused did not decide on what items to purchase or when these items were required and that the purchase would be left to the user of the goods. Secondly, PW5's evidence was also along the same line and additionally she also mentioned the lists of suppliers in all the 4 cases from which the accused picked Kua Agency. She had also admitted in her cross-examination that the other suppliers on the said list had problems supplying the goods ordered by her. Likewise PW12 evidence was that all purchases must get the approval of either the accused or the other 2 warrant holders but also in cross-examination he said that if the funds were available and the method of purchase was proper the accused had no decision to make but sign the vouchers.

...

For the culpable intent in this case before me the existence of the quotation lists as testified by PW5 assumed great importance because as stated by PW5 she submitted the lists with the quotations to the accused who then made the selection of Kua Agency in all 4 instances. The lists as I said, were not produced. On top of that the Department has in place a price monitoring system which PW12 confirmed was to give transparency to the purchases made by the Department and which the defence witnesses said provides all the relevant information on the suppliers and the prices for the goods they ordered.

In the face of these evidence, I failed to see why PW5 needed to have the list of suppliers and why, more importantly, she needed to call each and everyone of the suppliers on the so-called list to find out the prices for the goods stated in the 4 LPOs.

...

Viewed against the facts as I stated earlier that the said lists were not produced and given their significance in this case, the existence of the price monitoring system accessible to PW5's and there being no requirement for a quotation exercise (no matter that it was not a formal one as stipulated by the Treasury Instructions) I find that PW5 incriminating evidence against the accused must be viewed with suspicions and deemed unreliable for the purposes of sustaining a conviction against the accused.

...

Based on the above considerations it is also possible that the choice of Kua Agency was that of PW5 in the 4 instances or that of some unidentified person in the other instance, thus making the defence argument tenable that the accused's role on the 5 purchases was, merely to verify the purchases made and not strictly to approve them. It must be remembered that PW12 himself has testified that if funds were available and the method of purchase was proper, the accused had no decision to make but sign the vouchers and it was not disputed in the trial that funds were available nor was there any doubt that the Treasury Instructions in respect of purchase below RM10,000 was complied with. In this regard, the evidence of the witnesses (both prosecution and defence) testifying to the reliability of Kua Agency as a supplier to the goods ordered would also be of some significance. I would therefore hold that the accused had succeeded in raising a reasonable doubt that he had the required mens rea for the commission of the 5 offences for which he was charged.

As for the accused's failure to declare his interest and to disqualify himself, given that his direct involvement in the 5 purchases was doubtful and viewed against his role as a verifier of the goods purchased, which goods, said PW4, PW5 and DW2 would have been delivered to the Department before the accused signed the 5 LPOs, such failure is to my mind not fatal in the circumstances of his case.

Accordingly I find that the prosecution has failed to prove the 2nd ingredient of the charges beyond reasonable doubt ie, that the accused had abused his position as a public servant for his pecuniary or other advantages as required by section 2(1) of the Ordinance in respect of each and every one of the 5 charges and I would therefore discharge and acquit him of the same.

In my oral judgment I said this:

> Having heard learned DPP and the learned counsel for the respondent and having considered the materials before me, I am of the view that the finding of facts by the trial Court requires no interference by this Court. Further there appears to be a gap in the evidence adduced by the prosecution pertaining to the signing of the Local Purchase Order. As such I dismiss this appeal and affirm the decision of the trial Court.

From the excerpts of the judgment of the learned Sessions Court Judge it is obvious that in totality of the evidence before the court she was not convinced with the evidence of the main witness for the prosecution, that is, PW5 Madam Goh Swee Ping. And as for the other material witnesses such as PW4, Encik Sidek bin Hj. Ahmad and PW12 Tuan Haji Zakaria bin Abdullah, the learned Sessions Court judge was also in doubt as to reliability of their version that the respondent had the responsibility to make a decision as to which supplier to order the goods from. That was because it was the common answer of these witnesses during cross-examination that if there were funds available for the purchase of goods required by the Division then there was no necessity for a decision to purchase to be made.

Since the trial court was in doubt on the factual evidence adduced by the prosecution relating to the *mens rea* for the offences as per charges I did not think there was any reason for an appellate court to interfere. More so, in this case when there was no strong assertion that the factual conclusions of the trial court was grossly erroneous, (see *Mat v. PP* [1963] MLJ 263). And of course it is not to be overlooked that it is trite law that an appellate court should be slow to interfere with finding of fact of a trial court. Such principle has been succinctly stated by his Lordship Hashim Yeop Sani FJ (as he then was) in the case of *Lim Kheak Teong v. PP* [1984] 2 CLJ 219; [1984] 1 CLJ (Rep) 207 where he said:

> With respect, what Lord Russell of Killowen said in Sheo Swarup was that although no limitations should be placed on the power of the appellate court, in exercising the power conferred "the High Court should and will always give proper weight and consideration to such matters" as:
>
> (1) the views of the trial Judge on the credibility of the witnesses;
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> (2) the presumption of innocence in favour of the accused;
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> (3) the right of the accused to the benefit of any doubt; and
>
> (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses.

As regards the signing of the Local Purchase Orders there was also no evidence adduced or legal submission made indicating that notwithstanding the signing was after the delivery of the goods purchased, it was nevertheless an offence under the Ordinance. And it was in evidence that the respondent only signed the Local Purchase Orders after the Department received the items ordered or at least some of them. Hence it was quite justified for the trial Sessions Court judge to say that it was possible that the decision to purchase the goods from Kua Agency could have been made by some other person or persons and not necessarily the respondent. As such on the facts of this case the signing of the Local Purchase Orders alone would not satisfy the element of *mens rea* for the offence under the charges preferred.

There was also a missing link in my view of the evidence in respect of the procedural requirement in making purchases of goods for the Division whilst bearing in mind that it was in evidence of an existence of a monitoring system at that time. No one with some sound knowledge of the procedure in the purchases of goods for the Division was called by the prosecution as a witness. That could have cleared the doubt of whether there was still a need to make any decision pertaining to selection of a supplier when there was already a standard price monitoring system set up with a view to enhance transparency. The evidence of the witnesses called *albeit* they were not the senior officers of the Division at that time indicated that the signing of the Local Purchase Orders was a matter of course with no element of decision making process. That again would defeat any assertion of *mens rea* arising from the signing of the said documents *vis-a-vis* O. 153(4)(a) of the Sarawak State General Order.

And I do not think this case should be taken as being on all fours with the case of *Wong Voon (supra)*. In that case it was not in dispute that the accused issued the Local Purchase Orders before the supply of the goods. And it was also obvious that there was a decision making role of the accused when he had to select the suppliers. Thus heavy reliance by the prosecution on that case was quite perilous to its case.

Accordingly for the above reasons that I dismissed the appeal by the prosecution against the decision of the learned Sessions Court judge to discharge and acquit the respondent of the five charges.